Contents

CHAPTER 18

Use of Force

A. GENERAL

1. Frameworks Guiding U.S. Use of Force

On July 24, 2019, State Department Acting Legal Adviser Marik String testified before the Senate Foreign Relations Committee on the scope of authority in the 2001 and 2002 authorizations for the use of military force ("AUMFs"). The testimony is excerpted below and available at https://www.foreign.senate.gov/download/string-testimony-073019.

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I am here today to address the Administration's view of the scope of the 2001 and 2002 AUMFs as they relate to Iran, as well as more general questions about the President's current authorities to use force and the Administration's position on a new AUMF.

The Administration is not seeking a new AUMF against Iran or any other nation or non-State actor at this time. In addition, the Administration has not, to date, interpreted either the 2001 or 2002 AUMF as authorizing military force against Iran, except as may be necessary to defend U.S. or partner forces as they pursue missions authorized under either AUMF. The latter nuance is simply a reassertion of a long-standing right of self-defense for our military forces and those allies and partners deployed alongside them. Simply put, where U.S. forces are engaged in operations with partner forces anywhere in the world pursuant to either the 2001 or 2002 AUMF, if those forces either come under attack or are faced with an imminent armed attack, U.S. forces are authorized to use appropriate force to respond where it is necessary and appropriate to defend themselves or our partners. This principle is not new, and it is not specific to Iran or to any other particular country or non-State group.

The 2001 and 2002 AUMFs remain the cornerstone for ongoing military operations in multiple theaters and are a demonstration of U.S. strength and resolve. The 2001 AUMF

provides the President authority to use military force against al-Q'aida, the Taliban, and their associated forces, including against ISIS. That authority includes the authority to detain enemy personnel captured during the course of the ongoing armed conflict.

But it is important to note that the 2001 AUMF is not a blank check. It does not authorize the President to use force against every group that commits terrorist acts or could have links to terrorist groups or facilitators. As of today, the Executive Branch has determined that only certain terrorist groups fall within the scope of the 2001 AUMF, none of which are currently state actors. These groups are: al-Qa'ida; the Taliban; certain other terrorist or insurgent groups affiliated with al-Qa'ida and the Taliban in Afghanistan; al-Qa'ida in the Arabian Peninsula; al-Shabaab; al-Qa'ida in the Lands of the Islamic Maghreb; al-Qa'ida in Syria; and ISIS.

The 2002 AUMF remains an important source of additional authority for military operations against ISIS in Iraq and to defend the national security of the United States against threats emanating from Iraq. The United States also relied on the 2002 AUMF as an additional source of authority to detain in recent litigation.

As you know, Section 1264(b) of the FY2018 National Defense Authorization Act states that, not later than 30 days after the date on which a change is made to the legal and policy frameworks for the United States' use of military force and related national security operations, the President is to notify the appropriate congressional committees of the change, including its legal, factual, and policy justifications. As such, there is a mechanism to report to Congress if any changes to our legal assessments may occur in the future, which has been used by this Administration on more than one occasion to keep the relevant Committees informed. More generally, the Administration has kept Congress informed about operations overseas on a regular basis, consistent with the War Powers Resolution.

Beyond the AUMFs, Article II of the Constitution empowers the President, as Commander in Chief and Chief Executive, to order certain military action in order to protect the Nation from an attack or imminent threat of attack and to protect important national interests. The legal and historical foundation of this Constitutional authority to protect the national security interests of the United States is extensive. The Department of Justice's Office of Legal Counsel (OLC) has issued a series of opinions under both Democratic and Republican presidents about the President's use of the Article II authority over more than two centuries.

Prior Administrations have consistently relied on the President's Constitutional authority to direct military force without specific prior congressional authorization, including in military operations in Libya in 2011; a bombing campaign in Yugoslavia in 1999; troop deployments in Haiti twice, in 2004 and 1994, Bosnia in 1995, and Somalia in 1992; air patrols and airstrikes in Bosnia from 1993-1995; an intervention in Panama in 1989; and bombings in Libya in 1986. Most recently, OLC explained this view in its 2018 opinion concerning the April 2018 use of force against chemical weapons targets in Syria.

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2. Notifications to Security Council of Action in Self-Defense

On August 1, 2019, the U.S. Mission to the UN transmitted to the president of the Security Council a letter informing the Council of an action taken in self-defense, when the United States took necessary and proportionate defensive military action that

resulted in the destruction of at least one Iranian unmanned aerial system ("UAS") approaching a U.S. ship in the Strait of Hormuz on July 18, 2019. The text of the letter follows, and is available at https://undocs.org/en/S/2019/624. U.N. Doc. S/2019/1624.

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I wish, on behalf of my Government, to report that, on 18 July 2019, the United States took action in the self-defence of United States forces following a threat to a United States Navy vessel by forces of the Islamic Republic of Iran.

On that date, at approximately 10 a.m. local time, the amphibious ship USS *Boxer* was in international waters conducting a planned inbound transit of the Strait of Hormuz. Iranian unmanned aerial systems approached the USS *Boxer* and closed within a threatening range. In response, and in accordance with the inherent right of self-defence, United States forces aboard the ship took necessary and proportionate defensive military action to ensure the safety of the ship and its crew, resulting in the destruction of one or more unmanned aerial systems.

This action occurred in the context of a series of escalating hostile acts by the Islamic Republic of Iran that have endangered international peace and security, including recent attacks on commercial vessels off of the port of Fujayrah and in the Gulf of Oman. In addition, on 19 June 2019, the Islamic Republic of Iran used a surface-to-air missile to shoot down an unmanned United States Navy MQ-4 surveillance aircraft monitoring the Strait of Hormuz. The aircraft was operating in international airspace on a routine surveillance mission, supporting the freedom of navigation and the security of international commerce.

The United States wishes to note that it stands ready to engage without preconditions in serious negotiations with Iran, with the goal of preventing further endangerment of international peace and security or escalation by the Iranian regime.

I ask that you circulate the text of the present letter as a document of the Security Council.

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3. Use of Force Issues Related to Counterterrorism Efforts

On November 19, 2019, the President sent a letter to the U.S. Senate and House of Representatives pursuant to the War Powers Resolution. The letter is excerpted below and available at https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-7/.

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As I most recently reported on July 22, 2019, United States Armed Forces have been deployed to the Middle East to protect United States interests and enhance force protection in the region against hostile action by Iran and its proxy forces. Iran has continued to threaten the security of the region, including by attacking oil and natural gas facilities in the Kingdom of Saudi Arabia on September 14, 2019. To assure our partners, deter further Iranian provocative behavior, and bolster regional defensive capabilities, additional United States Armed Forces have been ordered to deploy to the Middle East.

Additional forces ordered to deploy to the Kingdom of Saudi Arabia include radar and missile systems to improve defenses against air and missile threats in the region, an air expeditionary wing to support the operation of United States fighter aircraft from the Kingdom of Saudi Arabia, and two fighter squadrons. The first of these additional forces have arrived in Saudi Arabia, and the remaining forces will arrive in the coming weeks. With these additional forces, the total number of United States Armed Forces personnel in the Kingdom of Saudi Arabia will be approximately 3,000. These personnel will remain deployed as long as their presence is required to fulfill the missions described above.

I have taken this action consistent with my responsibility to protect United States citizens at home and abroad and in furtherance of United States national security and foreign policy interests, pursuant to my constitutional authority to conduct United States foreign relations and as Commander in Chief and Chief Executive.

I am providing this report as part of my efforts to keep the Congress informed, consistent with the War Powers Resolution (Public Law 93-148). I appreciate the support of the Congress in these actions.

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4. Bilateral and Multilateral Agreements and Arrangements

a. North Macedonia Accession to NATO

On February 6, 2019, in Brussels, the United States and the other parties to the North Atlantic Treaty signed the Protocol to the North Atlantic Treaty on the Accession of the Republic of North Macedonia. The United States is the depositary government for the North Atlantic Treaty and agreed also to serve as depositary for the Protocol. On October 22, 2019, the Senate provided its advice and consent to ratification of the Protocol. See https://www.congress.gov/treaty-document/116th-congress/1/resolution-text?r=4&s=2. On October 23, 2019, the State Department issued a press statement by Secretary of State Michael R. Pompeo, available at https://www.state.gov/welcoming-u-s-senate-approval-of-nato-accession-protocol-for-north-macedonia/, noting the Senate's advice and consent and looking forward to North Macedonia becoming the 30th NATO Ally.

On November 29, 2019, the United States deposited its instrument of ratification of the Protocol, which requires the deposit of similar instruments by all North Atlantic Treaty parties before entry into force.*

b. Defense Cooperation with Hungary

On April 4, 2019, the United States and Hungary signed an agreement on defense cooperation ("DCA"), which entered into force August 21, 2019. An April 4, 2019 State Department media note, available at https://www.state.gov/united-states-and-hungary-sign-defense-cooperation-agreement-2/, includes the following statement on the agreement: "The DCA builds on many aspects of the strong U.S.-Hungary defense relationship and will facilitate greater partnerships to address shared threats and global challenges." The text of the DCA is available at https://www.state.gov/hungary-19-821.

c. Special Measures Agreement with Republic of Korea

On April 5, 2019, the United States and the Republic of Korea signed a defense special measures agreement ("SMA"), which entered into force upon signature and with effect from January 1, 2019. The text of the agreement, with an implementing arrangement, can be found at https://www.state.gov/19-405. The SMA expired December 31, 2019.

d. Defense Cooperation Agreement with Egypt

On January 8, 2019, the United States and Egypt signed an agreement regarding the furnishing of defense articles, related training, and other defense services from the United States to Egypt. The agreement entered into force upon signature. The text is available at https://www.state.gov/19-108/.

e. Defense Research and Development Agreement with Switzerland

On April 17, 2017, the U.S. Defense Department and the Swiss Department of Defence signed an agreement for research, development, test, and evaluation projects. The agreement entered into force April 17, 2019. The text of the agreement, with annexes, is available at https://www.state.gov/19-417.

* Editor's note: On March 27, 2020, North Macedonia deposited its instrument of accession.

f. Brazil Designated as Major Non-NATO Ally

In Presidential Determination No. 2019–21 of July 31, 2019, the President designated the Federative Republic of Brazil as a "Major Non-NATO Ally" pursuant to section 517 of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2321k) (the "Act"), for the purposes of the Act and the Arms Export Control Act (22 U.S.C. 2751 *et seq.*). 84 Fed. Reg. 43,035 (Aug. 19, 2019).

5. International Humanitarian Law

a. Civilians in Armed Conflict

The United States participated in the Vienna Conference on Protecting Civilians in Urban Warfare, October 1-2, 2019. The U.S. paper provided at the conference is available at https://www.bmeia.gv.at/en/european-foreign-policy/disarmament/conventional-arms/explosive-weapons-in-populated-areas/protecting-civilians-in-urban-warfare/protecting-civilians-in-urban-warfare/statements//. The Vienna paper identifies and provides links to official U.S. documentary sources (i.e. laws, orders, manuals, studies, reports) related to U.S. practice in mitigating civilian harm in military operations. The United States provided a joint working paper along with Belgium, France, Germany, and the United Kingdom for the follow-up Geneva Meetings on Protection of Civilians, which is excerpted below, and available at https://www.dfa.ie/our-role-policies/international-priorities/peace-and-security/ewipa-consultations/informalconsultationswrittensubmissions/written-submissions---18-november-2019-consultations.php.

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Practical Measures to Strengthen the Protection of Civilians During Military Operations in Armed Conflict

This technical compilation of practical measures is submitted on behalf of the following contributing States: Belgium, France, Germany, the United Kingdom, the United States, [. . . .].

The purpose of this technical compilation is to identify practical measures that States can implement to strengthen the protection of civilians in military operations in the context of armed conflict, consistent with their existing obligations in international humanitarian law (IHL, also often referred to as the law of war or law of armed conflict).[20]

[20] The paper is not intended to and does not create new obligations under international law or modify existing obligations and is without prejudice to the discretion States have with regards to the manner in which they fulfill their legal obligations and in taking possible further policy measures to enhance the protection of civilians. The discussion of particular IHL obligations is without prejudice to other obligations under IHL that may be applicable.

Concerns have been raised regarding civilian casualties in current armed conflicts, especially civilian casualties in urban warfare when explosive weapons have been used. The causes of harm to civilians in current armed conflict can be complex and involve a range of factors, including incidental harm caused during lawful attacks directed against military objectives, deliberate targeting of civilians in violation of IHL, mistaken or lack of identification of the presence of civilians, or the use of human shields by terrorist groups. Although recognizing this complexity and the need to continue to consider comprehensively all sources of risk to civilians, the promotion of the broad range of practical measures to strengthen the protection of civilians in military operations conducted by responsible States can yield immediate and concrete results.

Under a strong convergence of legal, humanitarian, and strategic imperatives, responsible militaries have developed programs of compliance with IHL and a broad range of other practical measures to reduce the likelihood of harm to civilians and civilian objects. These practices, including training, operational procedures and methodologies, and diverse weapon systems and capabilities, when applied together, can be mutually reinforcing and be even more effective than when applied individually. Moreover, the sharing and promotion of these practical measures among States could lead to their wider implementation, which would strengthen the protection of civilians in current and future armed conflicts.

This paper: (1) recognizes key IHL requirements for the protection of civilians; (2) identifies general measures that States can take to strengthen implementation of existing legal requirements and to improve civilian protection in military operations; and (3) identifies specific good practices that States can implement to improve civilian protection in military operations.

I. Key IHL Requirements for the Protection of Civilians

IHL requirements must be implemented to help effectuate the goal of protecting civilians, although IHL recognizes that civilian casualties are a tragic but, at times, unavoidable consequence of armed conflict.

IHL includes, *inter alia*, obligations to distinguish between the armed forces and civilian population, which apply both to parties in conducting attacks and to parties in defending against attacks.

In conducting attacks, a party to an armed conflict must, *inter alia*:

- refrain from any use of weapons that are prohibited as inherently indiscriminate;
- only make military objectives the object of attack, and refrain from making civilians or civilian objects the object of attack;
- refrain from attacks expected to cause death or injury to civilians and damage or destruction to civilian objects excessive in relation to the concrete and direct military advantage expected to be gained; and
- take precautions to reduce the risk of harm to civilians and other protected persons and objects in accordance with applicable international law. Such precautions can include, *inter alia*: effective advance warnings; cancelling or suspending an attack; and choice in the means or method of attack.

Outside the context of conducting attacks, a party to an armed conflict has obligations to take precautions to protect the civilian population, individual civilians, and civilian objects under

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The listing of a particular practice should also not be understood as an indication that the practice is undertaken out of a sense of legal obligation under customary law.

their control against the dangers resulting from military operations. Such precautions can include, in accordance with applicable international law, *inter alia*:

- refraining from placing military objectives in densely populated areas;
- removing civilians and civilian objects from the vicinity of military objectives;
- establishing areas where civilians are protected; and
- using distinctive and visible signs to identify certain specially protected persons and objects, such as hospitals and cultural property, in accordance with applicable international law.

A party to an armed conflict must also refrain from the use of "human shields." In particular, parties to a conflict may not use the presence or movement of protected persons or objects

- to attempt to make certain points or areas immune from seizure or attack;
- to shield military objectives from attack;
- or otherwise to shield or favor one's own military operations or to impede the adversary's military operations.

II. General Measures to Strengthen Implementation of IHL and Civilian Protection in Military Operations

The following general measures can be taken by States to strengthen the implementation of existing legal requirements and to improve civilian protection in military operations:

1. Instituting effective programs within their armed forces to help ensure compliance with IHL obligations related to the protection of civilians, which include:

a. Dissemination of IHL to the armed forces and periodic training of members of the armed forces on IHL;

b. Legal advisers advising commanders and other decision-makers within the armed forces on IHL;

c. Instructions, regulations, and procedures to implement IHL standards and to establish processes for ensuring compliance with IHL;

d. Internal mechanisms for the reporting of incidents involving potential IHL violations;

e. Assessments, investigations, inquiries, or other reviews of incidents involving potential IHL violations; and

f. Corrective actions, as appropriate.

2. Implementing, where appropriate, the specific good practices on civilian protection described below.

3. Developing, reviewing, and routinely improving other practices and policies to help protect civilians in military operations.

4. Supporting, as appropriate, the efforts of other States or parties to a conflict to implement their legal obligations and to improve the protection of civilians during military operations.

5. Sharing and exchanging, as appropriate, with other States information about policies, and practices, and lessons learned related to the protection of civilians.

III. Specific Good Practices to Improve the Protection of Civilians During Military Operations

The following good practices can be implemented where States deem relevant and appropriate, whether individually or in combination with other States, to improve the protection of civilians during military operations:

1. Commanders, at all levels, exercising leadership necessary to reduce the risk of harm to civilians and civilian objects. This may include:

a. Setting a command climate that fosters discipline, IHL compliance, and an understanding of the importance of civilian protection.

b. Determining the appropriate application of accountability and other corrective measures to ensure that the forces under their command respect IHL and effectively implement other good practices to protect civilians.

2. Training personnel on practices that reduce the likelihood of civilian casualties. This may include:

a. Training commensurate with each person's duties and responsibilities,

b. Additional training before an individual or unit is deployed to an active theater of military operations.

c. Practical learning, such as the use of exercises, simulations of complex operational environments that include civilians, and the use of specialized, realistic training environments, such as urban warfare training centers.

3. Developing, acquiring, and fielding intelligence, surveillance, and reconnaissance systems that contribute to the protection of civilians by enabling more accurate battlespace awareness.

4. Developing, acquiring, and fielding a range of weapons systems and other technical capabilities that further enable discriminate military operations in different environments and operational contexts, such as technology that results in more precise kinetic effects, weapons designed to avoid or minimize the occurrence of explosive remnants, and capabilities that can neutralize military objectives with temporary or reversible effects.

5. Issuing military procedures, including doctrine (such as tactics, techniques, and procedures), standard operating procedures, and special instructions, that address the effective conduct of military operations across the targeting cycle. This may include:

a. Targeting processes for analyzing, selecting, and prioritizing targets and matching the appropriate responses against them, considering operational requirements and capabilities.

b. Collateral Damage Estimation Methodologies to conduct collateral damage analyses and to produce collateral damage estimates that assist commanders in understanding risks to civilians and in applying the principle of proportionality.

c. Weaponeering processes to determine the specific means required to create a desired operational effect (*e.g.*, destruction, neutralization, suppression, or disruption), and for taking actions to mitigate the risk of collateral damage, such as the appropriate pairing of weapons and targets, aim points, timing or angle of weapons fire, and munition fuzing.

6. Issuing to the armed forces rules of engagement (ROE) to ensure that the individuals within the chain of command best positioned to make judgments relevant to accomplishing the mission and to protecting civilians are empowered to do so. This may include:

a. Authorizing subordinates to take additional precautions to mitigate previously unanticipated risks to civilians that they discover or to refrain from conducting an attack when

such action would best achieve the commander's intent if the commander had known about such risks;

b. Procedures for presenting to more senior commanders for decision certain potential attacks on targets that involve higher risks of incidental harm; and

c. Requirements for additional review or higher-level approval before certain sensitive military objectives may be attacked.

d. Requirements for fielded forces at the tactical level to apply sound judgment and to comply with IHL continually when dynamic weapon employment occurs outside of deliberate targeting processes.

7. Conducting assessments and other reviews that assist in reducing civilian casualties by identifying risks to civilians and evaluating efforts to reduce such risks. This may include:

a. General assessments of the risks to the civilian population that inform operational planning and other civilian protection measures, such as the identification of places and facilities for placement on a "no-strike" or "special authorization" list, including places and facilities that are protected from the effects of military operations under international law and places and facilities whose destruction may have entail significant risk of collateral damage, such as dams.

b. Assessments or other reviews of reports of specific incidents involving civilian casualties.

8. Considering civilian protection issues in the course of operational planning. This may include consideration of:

a. Risks of death or injury to the civilian population, including risks that have been specifically identified in assessments and those risks posed by the potential placement of military bases, facilities, or forces.

b. Potential measures to mitigate risks to the civilian population, such as hospital and safety zones, civilian evacuation measures, the delivery of warnings, and adjusting the timing of operations and the places where enemy forces are engaged.

c. The likely military and humanitarian effects from the implementation of such potential measures, including possible responses by an adversary or another party that would place civilians at greater risk and possible risks to civilians posed by inaction or delay.

9. Communicating with impartial humanitarian organizations, such as the International Committee of the Red Cross, or other relevant non-governmental organizations, including to encourage them to assist in efforts to distinguish between military objectives and civilians by appropriately marking protected facilities, vehicles, and personnel and by providing updated information on the locations or movements of such facilities, vehicles, and personnel.

10. Studying past operations to identify lessons learned with respect to civilian protection and incorporating those lessons into military doctrine and other military guidance and procedures.

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b. Report on Civilian Casualties

On March 6, 2019, President Trump issued Executive Order 13862, which revokes Section 3 of Executive Order 13732. 84 Fed. Reg. 8789 (Mar. 11, 2019). Section 3 of

Executive Order 13732 required certain reporting on civilian casualties. A White House press release (excerpted below and available at https://www.whitehouse.gov/briefings-statements/text-letter-president-selected-congressional-committee-leadership/) further explains the President's decision to revoke Section 3 of Executive Order 13732 and clarifies that all other provisions of that order (which include policy statements regarding the protection of civilians in armed conflict) continue to apply:

> After closely evaluating the reporting requirement called for in Executive Order 13732 and in light of subsequent requirements specified by the Congress in the Act, I determined to revoke section 3 of Executive Order 13732, while retaining all other portions of that Executive Order. The report submitted to the Congress by the Department of Defense pursuant to section 1057 of the Act is more comprehensive in certain ways than the report Executive Order 13732 required, which was limited in geographic scope and type of United States Government operation.
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> The United States Government is committed to minimizing civilian casualties and complying with its obligations under the law of armed conflict. All United States efforts to minimize civilian casualties described in Executive Order 13732 continue to apply.

c. UN Security Council Briefing on International Humanitarian Law

On August 13, 2019, Acting U.S. Permanent Representative to the UN Ambassador Jonathan Cohen delivered remarks at a Security Council briefing on international humanitarian law. Ambassador Cohen's remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-international-humanitarian-law/.

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Seven decades ago, with the horrors of World War II still fresh, representatives from around the world gathered in Geneva to try and change the way wars were waged. Building on an existing framework of law of war treaties, the resulting Geneva Conventions enshrined formal legal rules to govern the conduct of war. The Conventions have played a significant role in shaping parties' behavior on the battlefield and improving protections for combatants and civilians alike.

Mr. President, today's briefing is an important opportunity to reflect on the successes of the Geneva Conventions, and to deepen and strengthen international compliance with, and enforcement of, these obligations.

Much has changed in the past 70 years. New technologies have emerged, which allow for greater precision in many cases, but also more deadly force. The rise of terrorist groups like Al Qaeda and ISIS has created new challenges as States work to defeat enemies who abide by no rules whatsoever. Today, the Geneva Conventions remain some of the very few universally-

ratified international treaties. They are a powerful articulation of international humanitarian law and have become synonymous with ethical behavior in war.

Mr. President, as UN Member States, we have several tools at our disposal to address violations of international humanitarian law. In certain instances of grave and systematic violations, war crimes tribunals have been important tools to hold offenders accountable. The United States is proud to have supported the establishment of the tribunals for Cambodia, Rwanda, Sierra Leone, and the former Yugoslavia, as well as their subsequent work to punish some of the worst offenders of international humanitarian law.

In other cases, however, obstacles to accountability remain. For the relevance of these Conventions to endure into the future, compliance and accountability are key. While Member States and parties to armed conflict are ultimately responsible for adhering to their IHL obligations, each of us has an important role to play in calling out violations and holding those responsible to account.

Mr. President, we continue to push for greater compliance with the Geneva Conventions by other actors, and we are also firmly committed to respecting our own obligations.

To this end, we support efforts to disseminate accurate information about IHL among all parties to conflicts. For example, the training of U.S. military personnel includes a thorough coverage of IHL in principle and practice.

We also incorporate IHL adherence into U.S. training for international military partners. This includes peacekeeping pre-deployment training that we offer for troop and police contributors supporting the UN and regional peace operations.

We have made the protection of civilians and civilian infrastructure, as well as humanitarian personnel, locations, and missions, a high priority in conflict areas, and we know that effective protection requires full adherence to IHL by all parties to conflict.

Mr. President, the United States will continue our efforts to respect, and ensure respect for, the Geneva Conventions. We call on all Member States—and the actors they support—to comply fully with their obligations, and to hold violators accountable.

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d. Applicability of international law to conflicts in cyberspace

On April 19, 2019, the U.S.-Japan Security Consultative Committee released a joint statement, which included an affirmation that international law applies in cyberspace. The joint statement is available in full at https://www.state.gov/u-s-japan-joint-press-statement/. The portion on cyberspace issues follows.

> On cyberspace issues, the Ministers recognized that malicious cyber activity presents an increasing threat to the security and prosperity of both the United States and Japan. To address this threat, the Ministers committed to enhance cooperation on cyber issues, including deterrence and response capabilities, but as a matter of priority, emphasized that each nation is responsible for developing the relevant capabilities to protect their national networks and critical infrastructure. The Ministers affirmed that international law applies in

cyberspace and that a cyber attack could, in certain circumstances, constitute an armed attack for the purposes of Article V of the U.S.-Japan Security Treaty. The Ministers also affirmed that a decision as to when a cyber attack would constitute an armed attack under Article V would be made on a case-by-case basis, and through close consultations between Japan and the United States, as would be the case for any other threat.

On September 23, 2019, the United States joined a group of countries in issuing a joint statement on advancing responsible state behavior in cyberspace. The joint statement by Australia, Belgium, Canada, Colombia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Italy, Japan, Latvia, Lithuania, the Netherlands, New Zealand, Norway, Poland, the Republic of Korea, Romania, Slovakia, Spain, Sweden, the United Kingdom, and the United States is available at https://www.state.gov/joint-statement-on-advancing-responsible-state-behavior-in-cyberspace/ and excerpted below.

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Over the past decade, the international community has made clear that the international rules-based order should guide state behavior in cyberspace. UN member states have increasingly coalesced around an evolving framework of responsible state behavior in cyberspace (framework), which supports the international rules-based order, affirms the applicability of international law to state-on-state behavior, adherence to voluntary norms of responsible state behavior in peacetime, and the development and implementation of practical confidence building measures to help reduce the risk of conflict stemming from cyber incidents. All members of the United Nations General Assembly have repeatedly affirmed this framework, articulated in three successive UN Groups of Governmental Experts reports in 2010, 2013, and 2015.

We underscore our commitment to uphold the international rules-based order and encourage its adherence, implementation, and further development, including at the ongoing UN negotiations of the Open Ended Working Group and Group of Governmental Experts. We support targeted cybersecurity capacity building to ensure that all responsible states can implement this framework and better protect their networks from significant disruptive, destructive, or otherwise destabilizing cyber activity. We reiterate that human rights apply and must be respected and protected by states online, as well as offline, including when addressing cybersecurity.

As responsible states that uphold the international rules-based order, we recognize our role in safeguarding the benefits of a free, open, and secure cyberspace for future generations. When necessary, we will work together on a voluntary basis to hold states accountable when they act contrary to this framework, including by taking measures that are transparent and consistent with international law. There must be consequences for bad behavior in cyberspace.

We call on all states to support the evolving framework and to join with us to ensure greater accountability and stability in cyberspace.

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B. CONVENTIONAL WEAPONS

1. Convention on Certain Conventional Weapons ("CCW")

a. Lethal Autonomous Weapons Systems

On November 13, 2019, Josh Dorosin of the State Department's Office of the Legal Adviser delivered the U.S. statement at the CCW Meeting of High Contracting Parties on consideration of the report of the Group of Governmental Experts ("GGE") on lethal autonomous weapons systems ("LAWS"). Mr. Dorosin's statement is excerpted below and available at https://geneva.usmission.gov/2019/11/20/ccw-u-s-statement-on-consideration-of-the-gge-report-on-laws/.

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The United States places great value in the Convention on Certain Conventional Weapons (CCW) as an international humanitarian law (IHL) treaty framework that brings together States with diverse security interests to discuss issues related to weapons that may be deemed to be excessively injurious or to have indiscriminate effects. We reaffirm our commitment to the full implementation of our obligations and to active, constructive participation in this week's conference.

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The United States fully supports the GGE's report. It demonstrates that the GGE—under the auspices of the CCW—is an important forum for exploring the complex issues related to emerging technologies in the area of LAWS, and that it can produce substantive, consensus conclusions that have real value for States. In particular, we support the endorsement of the eleven Guiding Principles affirmed by the GGE, including the new Guiding Principle developed this year. In our view, the GGE must, in furtherance of its mandate over the coming two years, underscore the Guiding Principle that IHL continues to apply fully to all weapons systems, including LAWS, and in that light we recommend giving significant attention to clarifying further the application of IHL to the potential development and use of LAWS.

The United States also particularly supports the inclusion of legal, technological, and military experts in States' participation at the GGE, in order to ensure that the work of the GGE reflects the best possible understanding of existing technology, the applicable legal framework, and military practice.

The United States remains of the view that form should continue to follow function in the GGE's work. Dictating a particular format for an outcome before working through the substance

will not allow for the fullest and most rigorous discussion of the relevant issues and development of common understandings. The Guiding Principles themselves have proven to be a very productive construct for building consensus, and continuing their elaboration and development through substantive discussion will allow the GGE to make real, tangible progress.

Finally, with regard to the bracketed text in the GGE report, the United States can support the inclusion of the term "development" in paragraph 26(e). We believe this term accurately characterizes the work the GGE has already been doing with regard to the Guiding Principles. This work should continue, as well as other potentially useful work, such as the compilation of good practices in conducting the legal review of weapons. We are also flexible on whether the GGE meets for thirty, twenty-five, or twenty days over the next two years, recognizing the need for sufficient time to discuss these complex issues fully, as well as the need to bear in mind the financial situation of the CCW.

We look forward to continuing our participation in the GGE in the coming years and affirm our readiness to work actively with the incoming Chairman on this very important topic.

* * * *

The final report of the GGE, which the High Contracting Parties adopted by consensus with strong U.S. backing, contains 11 Guiding Principles in Annex 4. UN Doc. CCW/GGE.1/2019/3, https://undocs.org/en/CCW/GGE.1/2019/3.

b. Incendiary Weapons

On November 14, 2019, Amanda Wall of the Office of the Legal Adviser delivered the U.S. statement at the CCW Meeting of High Contracting Parties on implementation of, and compliance with, the Convention and its Protocols. Ms. Wall's statement is excerpted below and available at https://geneva.usmission.gov/2019/11/20/ccw-u-s-statement-on-implementation-of-and-compliance-with-the-convention-and-its-protocols/.

> The United States does not support adding a separate item on Protocol III to the agenda of next year's meeting or amending Protocol III. Any focus on Protocol III at this time should be toward: (1) encouraging High Contracting Parties to comply with their obligations under Protocol III, and (2) encouraging States not party to the CCW and/or Protocol III to become party to the CCW and to consent to particular prohibitions and restrictions related to the use of incendiary weapons near concentrations of civilians.
>
> The United States believes that Protocol III defines the term "incendiary weapon" properly and that the scope of Protocol III should not be amended to include weapons that are not "primarily designed to set fire to objects or to cause burn injury … through flame [and] heat." Many weapons have incidental or secondary incendiary effects, and the risk of weapons causing fires that might harm civilians depends on the circumstances in which the weapons are used. Just like with weapons that do not have any expected incendiary effect, it

is incumbent on the parties to use such weapons consistent with international humanitarian law, including by only making military objectives the object of attack, refraining from attacks expected to cause excessive injury or death to civilians and damage to civilian objects, and taking feasible precautions to reduce the risk of harm to civilians, including the risk of harm from fire.

In the U.S. experience, we think Protocol III is and continues to be a valuable and effective instrument of international humanitarian law. We believe that it has adequately contributed to norms related to the use of incendiary weapons.

c. Explosive Weapons and Protection of Civilians

On November 14, 2019, Matthew McCormack of the U.S. Department of Defense, Office of the General Counsel, delivered the U.S. statement at the CCW Meeting of High Contracting Parties on emerging issues, including protecting civilians. Mr. McCormack's statement is excerpted below and available at https://geneva.usmission.gov/2019/11/20/ccw-meeting-of-high-contracting-parties-u-s-statement-on-emerging-issues/.

* * * *

With respect to the agenda item on emerging issues, the United States shares the goal of protecting civilians during armed conflict, and we appreciate our German colleagues' support for the UNIDIR workshop in 2019 to bring attention to some of the challenges related to protecting civilians during urban warfare, including the risks posed when parties try to protect their military objectives by placing them in densely populated areas. We also appreciate the leadership of the Irish and Austrian delegations in this area, including by convening the Vienna Conference last month and by chairing the consultations next Monday in an open, inclusive, and transparent manner.

Urban areas are admittedly complex operating environments during war, but existing IHL appropriately governs the use of explosive weapons, like all weapons, including through principles and rules related to the protection of civilians. We believe that it is impractical and counterproductive to try to ban or stigmatize the lawful and appropriate use of explosive weapons as inherently problematic because the proper use of explosive weapons could strengthen civilian protection compared to other means and methods of warfare.

We also do not support making "EWIPA" or the "protection of civilians" a specific agenda item because the CCW is focused on prohibitions and restrictions applicable to certain types of weapons, rather than being a forum to address general issues related to the implementation of IHL. We would note in this regard that a focus on "EWIPA" rather than the broader issues with respect to improved implementation of IHL serves as an obstacle to progress on strengthening protections for civilians.

In this regard, the United States supports the sharing of good practices on civilian protection and improved implementation of IHL. If international dialog is to improve protections for civilians, the discussion must include substantial engagement by States conducting military operations. These States can bring necessary expertise and experience to assist in focusing the discussions on the concrete issues related to civilian harm and its root causes, and on specific measures that will effectively improve protections for civilians. We are ready and willing to share our own practices in this regard and look forward to engaging with others on this very important topic.

* * * *

2. U.S.-Ukraine MOU on Conventional Weapons Destruction

On June 25, 2019, the United States and Ukraine signed a new memorandum of understanding on conventional weapons stockpile management. The State Department media note announcing the MOU is excerpted below and available at https://www.state.gov/u-s-signs-new-conventional-weapons-destruction-memorandum-with-ukraine/.

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* * * *

[T]he memorandum sets out a $4 million U.S. contribution toward construction of six explosive storehouses over the next two years for the Ukrainian Ministry of Defense. This project will enhance the safety and security of Ukraine's munitions stockpiles, as well as advance Ukraine closer to its goal of meeting NATO and international standards for physical security and stockpile management.

From 2004 to 2018, the U.S. Conventional Weapons Destruction program has invested more than $40 million in support of Ukraine's effort to address the legacy of the large quantities of conventional arms and ammunition inherited after the dissolution of the Soviet Union. In 2018, as the Lead Nation for the NATO Partnership for Peace Trust Fund, the United States funded the destruction or demilitarization of over 1,700 metric tons of obsolete Soviet-vintage munitions in Ukraine.

In recent years, we have extended this partnership to save lives by providing support to clear landmines and other explosive hazards along the line of contact between the Ukrainian armed Forces and Russia-led forces in eastern Ukraine. In 2018 alone, the U.S. government funded conventional weapons destruction efforts that cleared over 227,000 square meters (56 acres) of land and returned them to local communities.

* * * *

C. DETAINEES

1. Criminal Prosecutions: *Hamidullin*

As discussed in *Digest 2016* at 856-65, *Digest 2017* at 750-63, and *Digest 2018* at 696-710, the issue in *Hamidullin v. United States* is whether the United States was prohibited from prosecuting Hamidullin in federal district court without first holding a hearing before a military tribunal to determine whether he qualified as a prisoner of war under the Third Geneva Convention and thus was entitled to combatant immunity. The district court and court of appeals agreed that the United States was not required to hold such a hearing and that Hamidullin did not qualify for POW status or combatant immunity. On January 16, 2019, the United States submitted its brief in the U.S. Supreme Court in opposition to the petition for certiorari. The petition was denied on February 19, 2019. *Hamidullin v. United States*, No. 18–6011. Excerpts follow from the U.S. opposition brief.

* * * *

Petitioner renews his contentions that (1) before the United States can prosecute him in federal district court for committing federal crimes, Army Regulation 190-8 (1997) first requires a military tribunal to determine whether he is entitled to prisoner-of-war status and combatant immunity; and (2) he was entitled to combatant immunity under a broader, "common law" theory that goes beyond the Geneva Convention and allows fighters belonging to non-State insurgent groups to assert combatant immunity even in non-international armed conflicts. The court of appeals correctly rejected both claims, and its decision does not conflict with any decision of this Court or any other court of appeals. This case would also be a poor vehicle for review. No sound basis exists for concluding that a military tribunal would declare that petitioner is entitled to prisoner-of-war status under the Geneva Convention, when the Executive Branch and the federal courts in this case have already made a contrary determination. And even under the "common law" approach petitioner advocates, petitioner's claim of combatant immunity would fail because members of the Taliban and Haqqani Network would not be entitled to such immunity. Further review is unwarranted.

1. The court of appeals correctly rejected petitioner's argument that the United States government cannot prosecute him in an Article III court for committing federal crimes until after a military tribunal declares that he is not a prisoner of war.

a. Congress has provided that the Article III district courts "shall have original jurisdiction * * * of all offenses against the laws of the United States." 18 U.S.C. 3231. Here, petitioner was charged with (and convicted of) serious federal offenses based on his role in a violent attack on U.S. personnel.

The Geneva Convention provides that "[p]risoners of war" are entitled to certain protections, including combatant immunity, in "cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties," i.e., during an international armed conflict. Convention art. 2; … Article 4 defines the categories of persons

who qualify as prisoners of war within the meaning of the Convention. Among other things, members of a non-state militia group like the Taliban do not qualify unless they operate under a responsible commander, wear "a fixed distinctive sign recognizable at a distance," carry arms openly, and "conduct[] their operations in accordance with the laws and customs of war." Geneva Convention art. 4(A)(2). Article 5 then provides that, in an international armed conflict, if "doubt arise[s] as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy," qualify for prisoner-of-war status, then "such persons shall enjoy" those protections "until such time as their status has been determined by a competent tribunal." *Id*. art. 5; see *id*. art. 2. The term "competent tribunal" was selected to allow civil courts to settle questions of prisoner-of-war status, and civilian courts have done so. See Department of Defense Law of War Manual § 4.27.3 n.534 (rev. Dec. 2016).

Here, even if it applied, the Convention's "competent tribunal" requirement has been satisfied because the district court—an Article III court—is obviously a "competent tribunal" within the meaning of the text of Article 5. And the district court squarely determined that petitioner does not qualify as a prisoner of war under the relevant criteria set forth in Article 4—and thus is not entitled to combatant immunity—regardless of whether the Geneva Convention otherwise applied. See 114 F. Supp. 3d at 386-388. Specifically, the court found that "neither the Taliban nor the Haqqani Network fulfills the conditions of Article 4(A)(2)," because they "do not have a clearly defined command structure nor a fixed distinctive sign recognizable at a distance"; they "frequently utilize suicide bombers with concealed explosives" in addition to sometimes carrying guns openly; and they do not "conduct[] their operations in accordance with the laws and customs of war." *Id*. at 387. On appeal, petitioner "d[id] not identify a clear error in the district court's factual findings" and he does not claim in this Court that the Taliban or Haqqani Network satisfy the criteria under Article 4(A)(2).

Without disturbing those factual findings, the court of appeals—which would also be a "competent tribunal"—affirmed on an alternate ground. The court determined that, by 2009, the conflict in Afghanistan was clearly not an international armed conflict; rather, it was a non-international armed conflict governed instead by Article 3 of the Geneva Convention. As such, neither the Convention's protections for prisoners of war grounded in Article 4, nor Article 5's requirement of a determination of prisoner-of-war status by a "competent tribunal," applied. Petitioner does not seek review of the court of appeals' predicate determination that the conflict in Afghanistan was a non-international armed conflict at the time of the attack in 2009, which accords with the views of the "International Committee of the Red Cross and the executive branch of the United States government."

b. Notwithstanding the lack of any dispute on the underlying findings by the courts below—(1) that members of the Taliban and Haqqani Network would not be entitled to prisoner-of-war status under the Geneva Conventions even in an international armed conflict; and (2) that in any event, the attack here did not occur during an international armed conflict—petitioner contends that, under Army Regulation 190-8, he cannot be prosecuted for his federal crimes until a three-member military tribunal declares that he is not a prisoner of war. But even assuming that an Army Regulation could impose a prerequisite to the Department of Justice's prosecution of a criminal defendant in an Article III court under statutory authority, Army Regulation 190-8 does not do so here—let alone does it require a remand so that a military tribunal can make the same determination that both Article III courts in this case (and the Executive) have already made.

Army Regulation 190-8 expressly "implements" the "1949 Geneva Convention Relative to the Treatment of Prisoners of War." Army Reg. 190-8 ¶ 1-1(b) and (b)(3). It states that "U.S. policy" is that "[a]ll persons taken into custody by U.S. forces will be provided with the protections of" that Convention "until some other legal status is determined by competent authority." *Id.* ¶ 1- 5(a)(2). It states that, "[i]n accordance with Article 5" of the Geneva Convention, "if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces" qualifies for prisoner-of-war status, "such persons shall enjoy" such protection "until such time as their status has been determined by a competent tribunal." *Id.* ¶ 1- 6(a); see *id.* ¶ 1-6(b) ("A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces" and "who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists."). It then provides that a "competent tribunal shall be composed of three commissioned officers, one of whom must be of a field grade." *Id.* ¶ 1-6(c).

Petitioner's reliance on the regulation in this case is misplaced for several reasons. First, no appreciable doubt exists that petitioner does not qualify as a prisoner of war. See Gov't C.A. Br. 25, 27-41. Second, the regulation's implementation of Article 5 with respect to detainees "in the custody of the U.S. Armed Forces," Army Reg. 190-8 ¶ 1-1(a), does not purport to exclude Article III courts from being "competent tribunals" for purposes of Article 5 in the context of a criminal prosecution. Third, as the court of appeals correctly determined, Army Regulation 190-8 does not require that any "competent tribunal" determine petitioner's prisoner-of-war status because, like Article 5, it does not apply to someone like petitioner who committed his crimes while acting as part of a non-State armed group during a non-international armed conflict. As the decision below explained, "Army Regulation 190-8, in implementing Article 5, is also restricted by Article 5's applicability," and Article 5 is "only applicable in cases of international armed conflict." Instead, detention of such forces during a non-international armed conflict is governed by Article 3, which does not provide petitioner with any right not to be prosecuted for his crimes in federal court.

Petitioner asserts that "[n]othing" in the text of that regulation "limits its application" to "international armed conflicts." But as noted above, the regulation expressly states that it implements the Geneva Convention, which is generally limited to such conflicts. Paragraph 1-6 of that regulation—upon which petitioner principally relies—imposes requirements "[i]n accordance with Article 5," reiterates the text of Article 5 nearly verbatim, then gives specific content to that text. Army Reg. 190-8 ¶ 1-6(a). The relevant provisions of that regulation are accordingly appropriately understood, based on their text and context, to apply only during such conflicts.

Indeed, petitioner's contrary argument is foreclosed by more recent Department of Defense directives that were issued by higher-level authorities (*e.g.*, the Deputy Secretary of Defense) to provide authoritative guidance applicable to all DoD detention operations, including those in Afghanistan. See, *e.g.*, DoD Directive No. 2310.01E, DoD Detainee Program, Aug. 19, 2014, Incorporating Change 1, May 24, 2017. That Directive makes clear that the requirement to provide prisoner-of-war protections in certain cases until a competent tribunal has determined a detainee's status applies only "[d]uring international armed conflict." *Id.* ¶ 3(h); see also Department of Defense Law of War Manual § 4.27.2 (same).

c. The court of appeals also correctly rejected petitioner's argument that he is entitled to combatant immunity as a matter of the common law. Petitioner contends that this Court's Civil War-era cases establish that fighters belonging to non-State insurgent groups may assert combatant immunity in certain circumstances in which the Geneva Convention would provide no such protection, and that the court of appeals' decision conflicts with this Court's precedents. Those contentions lack merit.

The court of appeals correctly "decline[d] to broaden the scope of combatant immunity beyond the carefully constructed framework of the Geneva Convention." As the court explained, "[t]he principles reflected in the [pre-Geneva Convention] common law decisions" were "refined" and codified in the Geneva Convention, which "represents an international consensus" on the scope of combatant immunity. For that reason, the Geneva Convention's "explicit[]" definition "of lawful and unlawful combatants is conclusive."

The sweeping extension of combatant immunity to non-State insurgent groups that petitioner seeks would undermine the international consensus that the Geneva Conventions reflect; require the United States to treat lawless insurgents as if they were members of a regular national military; and would inhibit the government's ability to bring terrorists to justice. …

In any event, petitioner errs in suggesting that he would be entitled to common-law immunity under this Court's precedents. As those decisions recognize, during the Civil War the President determined that it was necessary to treat Confederate forces as enemy belligerents who might thereby receive combatant immunity, and the courts deferred to that determination. See *The Prize Cases*, 67 U.S. 635, 670 (1863) ("Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted."); see also *Baker v. Carr*, 369 U.S. 186, 212 (1962) ("[R]ecognition of belligerency abroad is an executive responsibility" that "defies judicial treatment.").

This Court explained that "[t]he insurgent States" during the Civil War "united in an organization known as the Confederate States, by which they acted through a central authority guiding their military movements," to which "belligerent rights were accorded by the Federal government" as "shown in the treatment of captives as prisoners of war, the exchange of prisoners, the release of officers on parole, and in numerous arrangements to mitigate as far as possible the inevitable suffering and miseries attending the conflict." *Dow v. Johnson*, 100 U.S. 158, 164 (1880). Here, by contrast, the "political department has not recognized the existence of a de facto belligerent power" entitled to belligerent rights, but has "recognized the existence of insurrectionary warfare prevailing," *The Three Friends*, 166 U.S. 1, 64 (1897), particularly by the time of the attacks here in 2009.

3. Petitioner does not contend that the decision below conflicts with any decision of any other court of appeals. Indeed, the issues petitioner raises here have not been addressed by any other court of appeals, and it is unclear how often they will arise in the future in the Fourth Circuit.

This would also be a poor vehicle for addressing the questions petitioner raises. First, petitioner cannot show that a remand to a tribunal of three military officers would change the outcome of this case. As the court of appeals explained, the federal prosecution of petitioner in this case reflects the Executive Branch's determination that he is not a prisoner of war; the

President determined in 2002 that Taliban forces were not entitled to prisoner-of-war status, even on the assumption that the conflict in Afghanistan was of an international character at that time; the Executive subsequently made clear its view that the conflict in Afghanistan is not of an international character; the district court here found (and the court of appeals did not disturb the determination) that petitioner would not be entitled to prisoner-of-war status even if the conflict were of an international character; and the court of appeals further determined that, "by 2009, the conflict in Afghanistan had shifted from an international armed conflict between the United States and the Taliban-run Afghan government to a non-international armed conflict against unlawful Taliban insurgents." No sound basis exists for concluding that three military officers would—or could—reach the opposite result, in contravention of the determinations by both the President and the federal courts. …

Second, even if the applicability of combatant immunity should be decided under the common law (rather than the terms of the Geneva Convention), petitioner still could not prevail. Even before the Geneva Convention, fighters for non-State insurgent groups during non-international armed conflicts were not entitled to prisoner-of-war protections. See, *e.g.*, William Winthrop, *Military Law and Precedents* 783 (2d ed. 1920) ("Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished."); General Orders No. 100: Instructions for the Government of Armies of the United States in the Field art. 82 (Lieber Code) (1863) (similar). In any event, the Taliban's systematic failure to adhere to the law of war would foreclose their members from claiming prisoner-of-war status. Indeed, the district court squarely determined that members of the Taliban and Haqqani Network would not be entitled to combatant immunity even if the conflict in Afghanistan in 2009 was still of an international character, because the Taliban defies the laws of war. See 114 F. Supp. 3d at 386-388. Petitioner identifies no authority for the proposition the common law requires application of combatant immunity to members of insurgent groups that do not themselves respect the law of war, and federal courts in other cases have uniformly rejected assertions of combatant immunity on behalf of members of the Taliban and other non-State armed groups that defy the laws of war. See, *e.g.*, *United States v. Hausa*, 2017 WL 2788574, at *6 & n.6 (E.D.N.Y. Jun. 27, 2017) (rejecting combatant immunity defense because al Qaeda does not comply with the laws of war); *United States v. Arnaout*, 236 F. Supp. 2d 916, 917 (N.D. Ill. 2003) (same); *Lindh*, 212 F. Supp. 2d at 553-558 (same for the Taliban); see also *United States v. Buck*, 690 F. Supp. 1291, 1298 (S.D.N.Y. 1988). Petitioner provides no sound basis for reaching a different result, or for believing that a military tribunal would do so.

* * * *

2. U.S. Court Decisions and Proceedings

a. Ali v. Trump

Ali, along with ten other Guantanamo detainees, filed a joint habeas petition in January 2018, arguing that their continued detention violates (1) the due process clause of the U.S. Constitution, because their detention is indefinite and arbitrary; and (2) the 2001

Authorization for the Use of Military Force ("AUMF"), because the AUMF and the laws of war do not permit indefinite detention, and any justification for their detention has unraveled because the practical circumstances of the armed conflict against the Taliban, al-Qaeda, and associated forces are unlike those of previous armed conflicts. The district court denied Ali's petition in 2018 and Ali appealed.

Ali sought initial hearing en banc solely on the question of whether the Due Process Clause applies to detainees at Guantanamo. The government response argued, *inter alia,* that the due process clause does not extend to unprivileged alien enemy combatants detained at Guantanamo. That response brief (not excerpted herein) is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/. The D.C. Circuit denied the petition for en banc review and the case was considered by a regular panel. The U.S. brief on appeal in *Ali v. Trump*, No. 18-5297 (D.C. Cir. 2019) is excerpted below and available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

Petitioner Abdul Razak Ali is detained at Guantanamo Bay as an unprivileged alien enemy combatant. In 2005, he filed a habeas petition challenging the legality of his detention. After a three-day evidentiary hearing, the district court found that petitioner had traveled to Afghanistan after September 11, 2001, to fight against U.S. and Coalition forces; that petitioner was captured while living in a safehouse in Pakistan with terrorist leader Abu Zubaydah and senior leaders of Abu Zubaydah's force; that the safehouse contained documents and equipment associated with terrorist operations; that petitioner had participated in Abu Zubaydah's terrorist-training program at the safehouse; and that, after his capture, petitioner had lied to the U.S. government about his identity for two years. The court therefore ruled that the government had demonstrated its authority to detain petitioner, and this Court affirmed that ruling. *Ali v. Obama*, 736 F.3d 542, 543 (D.C. Cir. 2013).

* * * *

I. Petitioner's Detention Is Authorized By The AUMF.

The threshold question presented by petitioner's appeal—albeit one that petitioner addresses only in perfunctory terms at the end of his brief (Br. 31-33)—is whether his law-of-war detention is authorized by statute. Because the statutory argument informs petitioner's constitutional arguments and its resolution could obviate the need to decide the constitutional questions presented in this case, we address it first. As the district court correctly determined, petitioner's claim that the government lacks statutory authority to detain him is foreclosed by controlling precedent.

The government's authority to detain petitioner derives from the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), as informed by the laws of war. The AUMF authorizes the use of "all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." *Id.*

The Supreme Court has interpreted this language as unambiguously allowing the President to detain an enemy combatant captured in the armed conflict authorized by the AUMF for the duration of that conflict. As a plurality of the Court explained in *Hamdi v. Rumsfeld*, the "detention of individuals . . . for the duration of the particular conflict in which they were captured[] is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." 542 U.S. 507, 518 (2004) (plurality). The plurality thus held that "Congress' grant of authority for the use of 'necessary and appropriate force' … include[s] the authority to detain for the duration of the relevant conflict." *Id.* at 521…

Congress ratified *Hamdi*'s holding in the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(a), (b)(2), 125 Stat. at 1562. The NDAA "affirms that the authority of the President" under the AUMF "includes the authority … to detain covered persons … pending disposition under the law of war." *Id.* § 1021(a). The NDAA further provides that "disposition of a person under the law of war" includes "[d]etention under the law of war without trial until the end of the hostilities authorized by the [AUMF]." *Id.* § 1021(c)(1). The NDAA thus makes clear that the AUMF authorizes detention "until the end of the hostilities"—not until some indeterminate deadline before the end of the hostilities.

This interpretation of the AUMF makes sense, and comports with the laws of war. "The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi*, 542 U.S. at 518. The risk that a combatant will return to the battlefield lasts as long as active hostilities remain ongoing. As a result, the power to detain also lasts as long as active hostilities remain ongoing—a principle this Court reaffirmed as recently as last year. *Al-Alwi v. Trump*, 901 F.3d 294, 298 (D.C. Cir. 2018) ("[W]e continue to follow *Hamdi*'s interpretation of the [2001] AUMF and the [NDAA's] plain language. Both of those sources authorize detention until the end of hostilities.").

* * * *

II. Even Assuming *Arguendo* That The Due Process Clause Extends To Petitioner, His Detention Comports With Due Process.

Petitioner separately argues that, whether or not his detention is statutorily authorized, he is entitled to habeas relief because his detention violates substantive and procedural due process. To reject that argument, the Court need not address the question whether petitioner has due-process rights. For even accepting for the sake of argument the mistaken premise that he does, the district court's judgment should be affirmed because petitioner's detention fully comports with whatever the Due Process Clause could be thought to contemplate in this context.

A. Substantive due process does not impose temporal limits on law-of-war detention.

Petitioner first argues that his law-of-war detention while ongoing hostilities continue violates substantive due process. As noted, petitioner cannot reasonably dispute that the government's detention authority, conferred by the AUMF as informed by the laws of war,

allows detention while hostilities continue. *Supra*, Part I. And petitioner does not contest that hostilities remain ongoing. *See Al-Alwi*, 901 F.3d at 298 ("Although hostilities have been ongoing for a considerable amount of time, they have not ended."). Petitioner nevertheless proposes that the Fifth Amendment imposes an unspecified limit on the length of law-of-war detention even while hostilities continue—a limit the government would transgress whenever a court determines that the duration of that detention "shocks the conscience." (citing *Rochin v. California*, 342 U.S. 165, 172 (1952)). The clear implication of this argument is that *no* amount of process could justify petitioner's continued detention, since substantive due process would forbid the government from detaining him at all.

Petitioner has not cited, and the government is not aware of, any case embracing the proposition that substantive due process requires the government to release enemy combatants before active hostilities have ended. Nor does such detention "shock the conscience" even if that standard were proper in the context of law-of-war detention, which it is not given the history and tradition of such detention. The purpose of law-of-war detention is to "prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi*, 542 U.S. at 518 (plurality). Such detention is a "fundamental and accepted … incident to war" that is accepted by "'universal agreement and practice.'" *Id.* (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)). Neither precedent nor common sense suggests that the government's detention authority should dissipate simply because hostilities are protracted. *Id.* at 520-21; *Al-Alwi*, 901 F.3d at 297-98. Accepting that substantive due process entitles petitioner to release would effectively reward the Nation's enemies for continuing to fight. Indeed, the government would be forced to release enemy fighters whenever a court believed that a conflict had gone on too long. Nothing in the Fifth Amendment, even if applied to enemy combatants detained at Guantanamo, would compel these radical results.

Petitioner attempts to justify his position that substantive due process precludes his detention with a trio of cases involving detention in contexts far removed from this one. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (immigration); *Clark v. Martinez*, 543 U.S. 371, 384 (2005) (immigration); *United States v. Salerno*, 481 U.S. 739, 746-47 (1987) (pre-trial detention). All three cases are inapposite because they did not concern the detention of enemy combatants captured abroad during active hostilities. …

* * * *

Even if petitioner's reliance on these cases were not misplaced, petitioner's detention would not offend substantive due process because it is not indefinite. Petitioner is detained because he was part of forces associated with al Qaeda, *Ali v. Obama*, 736 F.3d 542, 551 (D.C. Cir. 2013), and remains detained because hostilities against al Qaeda remain ongoing. His detention, in short, is bounded by the duration of those hostilities—which the Nation's adversaries are themselves extending by continuing to fight—and continues to serve the purposes of the detention while hostilities are ongoing. *See Demore v. Kim*, 538 U.S. 510, 527-29 (2003); *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018). Nor is petitioner's detention "arbitrary and punitive," as he asserts (Br. 21). "Captivity in war is neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war." *Hamdi*, 542 U.S. at 518 (plurality) (alterations and quotation marks omitted). Moreover, to ensure that military detention at Guantanamo remains "carefully

evaluated and justified, consistent with [U.S.] national security and foreign policy," the Executive has chosen periodically to review whether certain Guantanamo detainees' continued confinement is necessary to protect against a continuing significant threat to the security of the United States. 76 Fed. Reg. 13,277, 13,277 (Mar. 7, 2011) (Exec. Order No. 13,567); *see* NDAA § 1023 (establishing procedures for periodic detention review of unprivileged alien enemy combatants detained at Guantanamo). Pursuant to that process, the Executive has exercised its discretion to transfer out of U.S. custody most of the individuals detained at Guantanamo at the time of the Executive Order's issuance. In petitioner's case, however, the Executive has consistently determined through multiple periodic reviews that petitioner poses a continuing and significant threat to the security of the United States, and therefore should not be transferred.

B. The procedures governing petitioner's habeas proceeding are consistent with procedural due process.

Petitioner separately argues that, given the length of his detention, the government is required as a matter of procedural due process to prove the legality of his detention with "clear and convincing evidence," rather than by a preponderance of the evidence. But even assuming that petitioner has rights under the Due Process Clause, due process does not impose that heightened standard on habeas proceedings for an alien detained as an unprivileged enemy combatant at Guantanamo Bay. A majority of the Supreme Court has agreed that, even in the context of a *U.S. citizen* detained as an enemy combatant *in the United States*, requiring the government merely to put forward "credible evidence" of the lawfulness of detention is consistent with due process. *Hamdi*, 542 U.S. at 533-34 (plurality); ... The framework that is constitutionally permissible for U.S. citizens detained within U.S. sovereign territory is *a fortiori* sufficient for noncitizens detained at Guantanamo Bay. In light of *Hamdi*, this Court has held that the preponderance standard is constitutionally adequate. *Hussain v. Obama*, 718 F.3d 964, 967 n.3 (D.C. Cir. 2013); *Uthman v. Obama*, 637 F.3d 400, 403 n.3 (D.C. Cir. 2011); *Awad v. Obama*, 608 F.3d 1, 10 (D.C. Cir. 2010); *Al-Bihani v. Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010). Those holdings control here.

Petitioner suggests that the passage of time requires the government to satisfy a heightened evidentiary burden, rather than the evidentiary standard both the Supreme Court and this Court have held sufficient. But as this Court has previously recognized, in the context of a habeas petition filed by this very petitioner, "it is not the Judiciary's proper role to devise a novel detention standard that varies with the length of detention." *Ali*, 736 F.3d at 552.

Moreover, even setting aside that the length of petitioner's detention does not permit this Court to ignore binding precedent and address petitioner's constitutional argument anew, the constitutional balance continues to weigh in the government's favor. That is because, petitioner's assertions notwithstanding, the government's interest in preventing enemy combatants such as petitioner from returning to the battlefield while hostilities continue has not "grown weaker" over time. …

Furthermore, petitioner has failed to show that his preferred evidentiary standard would make any difference with respect to the lawfulness of his detention. This Court has already held that the record in petitioner's habeas case supplies "overwhelming" evidence of the legality of his detention. *Ali*, 736 F.3d at 545-46. Petitioner's boilerplate filings in district court, which were identical to those filed on behalf of ten other Guantanamo detainees, made no attempt to address this Court's analysis of the circumstances of his capture and his two-year deception of investigators. …

* * * *

Finally, petitioner asserts that his continued detention cannot be justified under *any* evidentiary standard unless the government can prove that he would currently pose a "specific and articulable danger" if released. But the cases on which petitioner relies arose in the context of pretrial detention and are inapposite. When fashioning procedures governing habeas petitions brought by Guantanamo detainees, "courts are neither bound by the procedural limits created for other detention contexts nor obliged to use them as baselines from which any departures must be justified." *Al-Bihani*, 590 F.3d at 877. "Detention of aliens outside the sovereign territory of the United States during wartime is a different and peculiar circumstance" that "cannot be conceived of as mere extensions of an existing doctrine." *Id.* Adopting a constitutionalized specific-and-articulable-danger standard would be especially inappropriate because the detention authority conferred under the AUMF is not contingent "[up]on whether an individual would pose a threat …if released"; instead, the Executive's detention authority turns exclusively "upon the continuation of hostilities." *Awad*, 608 F.3d at 11; *accord* Department of Defense, Law of War Manual § 8.14.3.1 (last updated Dec. 2016) ("For persons who have participated in hostilities or belong to armed groups that are engaged in hostilities, the circumstance that justifies their continued detention is the continuation of hostilities."), https://go.usa.gov/xymRX.

Furthermore, whether or not courts may assess a detainee's future dangerousness in other contexts, the question of petitioner's future dangerousness would not be justiciable in *this* context because it involves assessments of military conditions and national-security risks that the judiciary is ill-suited to address. *See Ludecke v. Watkins*, 335 U.S. 160, 170 (1948) (upholding an order removing an "enemy alien[]" during wartime because such a detainee's "potency for mischief" is a "matter[] of political judgment for which judges have neither technical competence nor official responsibility"); *People's Mojahedin Org. of Iran v. Department of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (*People's Mojahedin I*) (holding that the government's finding that "the terrorist activity of [an] organization threatens …the national security of the United States" is "nonjusticiable").

III. The Due Process Clause Does Not, In Any Event, Extend To Petitioner.

Because petitioner's detention comports with both substantive and procedural due process, this Court need not and should not decide whether the Due Process Clause extends to individuals such as petitioner, an Algerian national who is not present in the sovereign territory of the United States but rather is detained as an unprivileged enemy combatant outside that territory. Because petitioner's detention complies fully with any due process requirements that might apply, a judicial ruling on the threshold question whether petitioner has any due-process rights would be at best a gratuitously broad constitutional holding (if this Court holds that petitioner has no due-process rights) and at worst an improper advisory opinion (if this Court holds that petitioner has some due-process rights, though not the ones he claims in this case). Should the Court nevertheless reach the question, however, it should hold— consistent with controlling precedent—that petitioner lacks due-process rights.

A. The Due Process Clause does not extend to unprivileged alien enemy combatants detained at Guantanamo under the AUMF.

The Supreme Court's "rejection of extraterritorial application of the Fifth Amendment" has been "emphatic." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). In *Johnson*

v. Eisentrager, 339 U.S. 763 (1950), the Court held that aliens arrested and imprisoned overseas could not seek writs of habeas corpus on the theory that their convictions had violated the Fifth Amendment. The Court explained that "[s]uch extraterritorial application…would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment." *Id.* at 784. Yet "[n]ot one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it." *Id.* (citation omitted); *accord United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). The Court's holding in *Eisentrager* "establish[es]" that the "Fifth Amendment's protections" are "unavailable to aliens outside of our geographic borders." *Zadvydas*, 533 U.S. at 693 (citations omitted).

Consistent with this unbroken line of precedent, this Court has declined to extend the Due Process Clause to aliens "without property or presence" in the sovereign territory of the United States. *See, e.g., People's Mojahedin Org. of Iran v. Department of State*, 327 F.3d 1238, 1240-41 (D.C. Cir. 2003) (*People's Mojahedin II*) (describing this Court's application of the property-or-presence test to determine whether various foreign entities could invoke the Due Process Clause to challenge their designation as foreign terrorist organizations); *accord Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) (reiterating that "non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections").

The principle that the Due Process Clause extends only to aliens who are present in the United States (or claim due-process rights in connection with property they own in the United States) precludes the Clause's extension to petitioner, an alien unprivileged enemy combatant detained at Guantanamo under the AUMF. Both the Supreme Court and this Court have recognized that, as a *de jure* matter, the U.S. Naval Station at Guantanamo Bay is not part of the sovereign territory of the United States. *Rasul v. Bush*, 542 U.S. 466, 471 (2004) (explaining that Cuba exercises "ultimate sovereignty" over the base); *Kiyemba v. Obama*, 555 F.3d 1022, 1026 n.9 (D.C. Cir. 2009), *vacated*, 559 U.S. 131 (per curiam), *reinstated in relevant part*, 605 F.3d 1046, 1047-48 (D.C. Cir. 2010) (per curiam), *cert. denied*, 563 U.S. 954 (2011) (same). This Court has therefore rejected due-process claims brought by identically situated detainees. *Kiyemba*, 555 F.3d at 1026-27 (holding that, because the Due Process Clause does not extend to Guantanamo detainees, a district court lacked authority to order the government to release seventeen detainees into the United States). And in *Al-Madhwani v. Obama*, the Court similarly declined to accept the "premise[]" that Guantanamo detainees have a "constitutional right to due process," before concluding that even if they did, any procedural violation had been harmless. 642 F.3d 1071, 1077 (D.C. Cir. 2011). Because petitioner is indisputably an alien with no presence in the United States, the Due Process Clause does not extend to him with respect to his detention at Guantanamo. His substantive and procedural due process claims are therefore foreclosed.

The Court's decision in *Qassim v. Trump*, 927 F.3d 522, 2019 WL 2553829 (D.C. Cir. June 21, 2019), does not alter this conclusion. The question at issue in *Qassim* was whether *Kiyemba*'s recognition that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States," *id.* at *3 (quoting *Kiyemba*, 555 F.3d at 1026), constituted binding Circuit precedent as to "whether Guantanamo detainees enjoy procedural due process protections under the Fifth Amendment … in adjudicating their habeas petitions," *id.* at *4. The Court held that the answer was no, and construed *Kiyemba*'s holding to

apply only to "substantive due process claim[s] concerning the scope of the habeas remedy." *Id.* According to the Court, the district court's decision rested on the premise that "*Kiyemba* [had] firmly closed the door on procedural due process claims for Guantanamo Bay detainees." *Id.* The Court thus reversed the district court's judgment and remanded for that court "to consider in the first instance whether and how the Due Process Clause" applied to the *Qassim* petitioner's procedural due process claims. *Id.*

Qassim casts no doubt on the settled principle that substantive due process does not extend to aliens without property or presence in the United States. In *Kiyemba*, this Court applied that principle to reject a substantive due process claim regarding the scope of habeas relief. 555 F.3d at 1026-27; *accord* App. 22 (Tatel, J., concurring in denial of initial hearing en banc) ("Context … indicates that the [*Kiyemba*] court was referring to the right to substantive due process."). And *Qassim* had no occasion even to consider the question because the *Qassim* petitioner's constitutional claims sounded exclusively in procedural due process. 2019 WL 2553829, at *4. Thus, petitioner's substantive due process argument—that the Fifth Amendment independently limits the duration of his law-of-war detention even while hostilities remain ongoing and statutory authorization exists, and that *no* amount of process could justify his detention past that unspecified temporal limit, Br. 20-23—remains foreclosed.

Nor does *Qassim* undermine the vitality of the property-or-presence test as applied to procedural due process claims brought by foreign entities and persons. The Court declined to decide, or even to opine on, the merits of the *Qassim* petitioner's procedural-due-process claim. 2019 WL 2553829, at *6-7. The Court simply held that "Circuit precedent leaves open and unresolved the question of what constitutional procedural protections apply to the adjudication of detainee habeas corpus petitions." *Id.* at *6. That uncertainty is resolved by the Supreme Court's categorical refusal to apply the Fifth Amendment extraterritorially. *Eisentrager*—the Court's leading case, and indeed directly addressing the detention of enemy combatants under the laws of war—did not parse whether petitioners' due process claims sounded in substance or procedure before rejecting them out of hand. And the Court has continued to characterize *Eisentrager*'s holding broadly, never distinguishing between the Due Process Clause's substantive and procedural components. *Zadvydas*, 533 U.S. at 693; *Verdugo-Urquidez*, 494 U.S. at 269.

This Court's decisions in prior Guantanamo cases may not have answered "the specific question of what constitutional procedural protections apply to the adjudication of detainee habeas corpus petitions." *Qassim*, 2019 WL 2553829, at *6. Nevertheless, the Court's application of *Eisentrager* in *People's Mojahedin I* clearly resolves the question against petitioner. In that case, two foreign entities challenged the State Department's decision to designate them as "foreign terrorist organizations" pursuant to 8 U.S.C. § 1189. *People's Mojahedin I*, 182 F.3d at 18. The entities asserted that, because the State Department had failed to "giv[e] them notice and opportunity to be heard," their designations violated procedural due process. *Id.* at 22. Relying on *Eisentrager* and its progeny, this Court rejected the entities' constitutional claims. The Court explained that, because the Due Process Clause does not extend to aliens without property or presence in the United States, the entities "ha[d] no constitutional rights[] under the due process clause." *Id.* Thus, "[w]hatever rights [the entities] enjoy in regard to [their designations] are … statutory rights only." *Id.*

B. *Boumediene v. Bush* did not alter the principle that the Fifth Amendment does not apply to aliens such as petitioner.

Petitioner's only response to this body of precedent is to declare it irrelevant in light of the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008). *Boumediene*, however, held only that "Art. I, § 9, cl. 2 of the Constitution"—which prohibits Congress from suspending the privilege of the writ of habeas corpus—"has full effect at Guantanamo Bay" in the specific context of law-of-war detainees who had been detained there for an extended period. 553 U.S. at 771. The Court repeatedly emphasized that its holding turned on the unique role of the writ of habeas corpus in the separation of powers. *E.g.*, *id.* at 739 ("In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause."); *id.* at 746 ("The broad historical narrative of the writ and its function is central to our analysis."); *id.* at 743 ("[T]he Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme."). The Court concluded that treating "*de jure* sovereignty [as] the touchstone of habeas," even though the United States has *de facto* sovereignty over Guantanamo given its complete control, was "contrary to fundamental separation-of-powers principles." *Id.* at 755. Accordingly, *Boumediene* is consistent with the rule that the Fifth Amendment does not extend to aliens without property or presence in the United States.

Petitioner concedes that *Boumediene*, which "decided only that the Suspension Clause applies" at Guantanamo, did not itself confer Fifth Amendment rights on Guantanamo detainees such as himself. But petitioner suggests that *Boumediene*'s "functional" standard—which the Court created to govern the Suspension Clause's extraterritorial scope—should govern the extraterritorial scope of other constitutional provisions, including the Due Process Clause. Petitioner fails to appreciate the limits on *Boumediene*'s holding that the Supreme Court itself imposed. The Court expressly admonished that "our opinion does not address the content of the law that governs [the] detention" of Guantanamo detainees. *Boumediene*, 553 U.S. at 798.

Moreover, as *Boumediene* itself acknowledged, it is the *only* case extending a constitutional right to "noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty." 553 U.S. at 770. These caveats reflect the reality that, contrary to petitioner's suggestion that due process and habeas corpus are necessarily "intertwined" for purposes of extending due-process rights to Guantanamo detainees, the Suspension Clause secures "the common-law writ" of habeas corpus. In fact, the Clause was enacted "in a Constitution that, at the outset, had no Bill of Rights" or even a Due Process Clause. *Boumediene*, 553 U.S. at 739. Accordingly, *Boumediene*'s standard for determining whether the Suspension Clause extended to Guantanamo detainees does not apply *ipso facto* to the Due Process Clause and instead must be understood as limited to the Suspension Clause, in light of that Clause's centrality to the separation of powers. Indeed, this Court has previously recognized that "*Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions[] other than the Suspension Clause." *Rasul*, 563 F.3d at 529.

In any event, the Supreme Court has instructed that, "[i]f a precedent of th[e] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Given *Boumediene*'s express refusal to decide the extraterritorial scope of the substantive law governing detention, and given settled pre-

Boumediene precedent holding that the Due Process Clause does not extend to aliens outside the sovereign territory of the United States—and specifically to alien law-of-war detainees—this Court must follow the latter body of case law even if "*Boumediene* has eroded the precedential force of *Eisentrager* and its progeny." *Rasul*, 563 F.3d at 529; *see also Kiyemba*, 555 F.3d at 1031 ("[T]he lower federal courts may not disregard a Supreme Court precedent even if they think that later cases have weakened its force.").

Petitioner suggests that, in *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (en banc), the government conceded that *Boumediene*'s functional standard governs the extraterritorial scope of all constitutional rights. But the government's brief made no such concession. That brief stated only that the "Ex Post Facto Clause applies in military commission prosecutions" of certain Guantanamo detainees due to a "unique combination of circumstances" not present in this case. *Id.* at *64. Most significantly, the Ex Post Facto Clause was placed in Article I of the Constitution to constrain Congress's legislative authority by forbidding the criminal punishment of certain conduct. *Id.* And regardless, the Court's controlling *en banc* opinion in *Al Bahlul* assumed without deciding that the Ex Post Facto Clause would apply, underscoring that "we are not to be understood as remotely intimating in any degree an opinion on the question." 767 F.3d at 18 (quotation marks omitted). *Al Bahlul*'s treatment of the Ex Post Facto Clause does not bear on the question presented here.

C. Petitioner's particular due-process claims are at a minimum barred because they are not sufficiently intertwined with vindicating the Suspension Clause.

Finally, the due-process claims asserted by petitioner would not be available even if the Due Process Clause applied in some manner to Guantanamo detainees. Petitioner's due-process claims are cognizable only insofar as the Suspension Clause compels their adjudication through a habeas petition, because Congress eliminated statutory jurisdiction for this Court to consider his due-process claims. *Boumediene*, 553 U.S. at 771; *see* 28 U.S.C. § 2241(e). The Suspension Clause, however, "protects only the fundamental character of habeas proceedings," not "all the accoutrements of habeas for domestic criminal defendants." *Al-Bihani*, 590 F.3d at 876.

Thus, even if the Fifth Amendment applied to Guantanamo detainees such as petitioner, he would not be entitled to raise the full panoply of due-process rights possessed by domestic detainees, but at most only those fundamental rights recognized at the time of the Founding as part of the common and statutory law redressable through a habeas petition—and particularly as they would be applied to unprivileged enemy combatants. Petitioner's due process arguments, in contrast, are premised on substantive and procedural rights that, at the very least, lack this historic pedigree. Petitioner has thus failed to demonstrate how any of his due-process claims are sufficiently intertwined with vindicating the writ's constitutional core that they may be asserted in habeas under the Suspension Clause notwithstanding Congress's elimination of statutory jurisdiction. This conclusion is amplified by the fact that the Due Process Clause, at its core, is likewise aimed at protecting "those settled usages and modes of proceeding existing in the common and statute law of England." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856); *see Kerry v. Din*, 135 S. Ct. 2128, 2132-33 (2015) (plurality) (explaining that, "at the time of the Fifth Amendment's ratification, the words 'due process of law'" were coextensive with "the words 'by the law of the land'").

The government acknowledges that the Court has previously held that, when *Boumediene* concluded that the Suspension Clause barred application of 28 U.S.C. § 2241(e)(1) to preclude habeas petitions brought by unprivileged alien enemy combatants seeking to challenge the

legality of their detention at Guantanamo, the *Boumediene* Court "necessarily restored the status quo ante[] in which detainees at Guantanamo had the right to" bring not only "core habeas claims" but a panoply of other habeas claims under the federal habeas statute. *Kiyemba v. Obama*, 561 F.3d 509, 512 n.2 (D.C. Cir. 2009); *see also Aamer v. Obama*, 742 F.3d 1023, 1030 (D.C. Cir. 2014) (holding that the federal habeas statute encompasses conditions-of-confinement claims, even though they "undoubtedly fall outside the historical core of the writ"). The government continues to disagree with that result, which incorrectly interprets *Boumediene* to have improperly invalidated applications of 28 U.S.C. § 2241(e)(1) to collateral habeas claims that are not actually protected by the Suspension Clause, and preserves the issue for further review.

* * * *

b. Al-Hela v. Trump

In *Al-Hela v. Trump*, the district court denied habeas relief, reasoning that the government had authority under the 2001 AUMF to detain al-Hela at Guantanamo because he was substantially supporting al-Qa'ida and two associated forces—Egyptian Islamic Jihad ("EIJ") and the Aden-Abyan Islamic Army ("AAIA"). Al-Hela appealed and the United States filed a response brief in November 2019. *Al-Hela v. Trump*, No. 19-5079 (D.C. Cir.). A public, unclassified version of that brief is excerpted below and available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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* * * *

L Al-Hela Was Part Of And Substantially Supported Al Qaeda And Its Associated Forces

The district court's factual findings demonstrate that al-Hela was both part of and substantially supported al Qaeda and associated forces. Al-Hela does not address much of the most damaging evidence (his own [redacted text] statements), the district court's findings about al-Hela's lack of credibility during his live testimony at the merits hearing, or the evidence as a whole, instead attempting to undermine individual pieces of the case against him. These failures are especially glaring in light of the clear error standard of review. And al-Hcla's legal contentions have no basis in the text of the AUMF and NDAA, are inconsistent with the decisions of this Court, and ignore the realities of the conflict authorized by the AUMF.

A. Al-Hela's Travel Facilitation Activities and Logistical Support for Terrorist Plots Justify His Detention

The district court found that al-Hela more likely than not was a trusted facilitator for al Qaeda and its associated forces over a period of years. Al-Hela's relationships with numerous high-level al Qaeda, EIJ, and AAIA figures; his travel facilitation activities on behalf of al Qaeda and EIJ; and his support for multiple plots largely planned or carried out by AAIA all demonstrate that al-Hela was part of and substantially supported al Qaeda and associated forces.

1. During al-Hela's time in Afghanistan during the Soviet-Afghan war, he developed connections to other prominent jihadists, including with individuals close to Osama bin Laden and with Yasir Tawfiq al-Sirri, a high-level member of EIJ. The district court found that al-Hela's statements at the merits hearing about his age, which he used in an attempt to undermine the government's evidence of his time in Afghanistan, were not truthful.

These relationships continued—and grew in number—after al-Hela's return to Yemen. …

* * * *

3. Al-Hela's connections also played a role in his involvement in five planned, attempted, or accomplished terrorist attacks in Yemen in late 2000 and early 2001, including two planned attacks on the U.S. Embassy in Sana'a. Three of those attacks—a bombing of the British Embassy in October 2000, the attempted assassination of the Yemeni Minister of Interior in December 2000, and bombings around New Year's Day 2001—were carried out by AAJA members with logistical support from al-Hela. Al-Hela had a "relationship" with Jayul, the AAIA leader and bin Laden associate responsible for the attacks. Al-Hela likewise "assist[ed] members" of AAIA with another plot likely targeting the U.S. Embassy. [redacted text]

4. This evidence demonstrates that al-Hela is "part of" al Qaeda and associated forces. As this Court has explained, there is no "exhaustive list of criteria" for determining when an individual is "part of" al Qaeda or an associated force; instead, "that determination must be made on a case-by-case basis using a functional rather than a formal approach and by focusing on the acts of the individual in relation to the organization." *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010). Al-Hela's relationship with members of al Qaeda and EIJ began with his time in Afghanistan, and then continued through the late 1990s and early 2000s. He had close relationships with multiple prominent al Qaeda, EIJ, and AAIA figures; [redacted text] …

For many of the same reasons, these activities are also sufficient to show that al-Hela "substantially supported" al Qaeda and associated forces. As this Court has explained, "substantial support" of an enemy force is an "independent" criteria for detention. *Al-Bihani v. Obama*. 590 ft.3d 866,. 873-74 (D.C. Cir. 2010). Al-Hela does not appear to contest the district court's conclusion that his activities—serving as a "trusted and important facilitator" who obtained "fraudulent passports and passports with false identities" that enabled members of al Qaeda and EIJ to travel and providing "logistical support to numerous terrorist attacks and plots carried out by AAIA—are the sort of activities that can qualify as substantial support. …

B. Al-Hela Identifies No Error in the District Court's Findings That He Engaged in Travel Facilitation and Assisted With Terrorist Attacks

Al-Hela devotes much of his brief to efforts to undermine the district court's factual findings about his close relationships with numerous al Qaeda, AAIA, and EIJ figures; travel facilitation; and involvement in five terrorist plots. But al-Hela shows no error—much less clear error—in the district court's assessment of the evidence.

* * * *

C. Al-Hela's Contentions That These Activities Do Not Support Detention Are Meritless

1. Al-Hela offers various challenges to the legal basis for his detention, particularly the district court's conclusion that he "substantially supported" al Qaeda and its associated forces. These challenges are largely irrelevant; as discussed above, the district court's factual findings are more than sufficient to demonstrate that al-Hela was "part of" al Qaeda and associated forces, and this provides an alternative basis for affirming the district court's judgment. Al-Hela contends that conclusion is unwarranted because he did not "swear allegiance," "serve as a combatant," or visit a guesthouse or training camp. But this argument simply ignores this Court's rejection of efforts to create an "exhaustive list of criteria" for demonstrating that an individual is "part of" al Qaeda or an associated force, and this Court's instruction that the determination instead turns on a "functional" analysis of "the actions of the individual in relation to the organization." *Bensayah,* 610 F.3d at 725; *accord Hussain,* 718 F.3d at 968. Al-Hela's actions in relation to al Qaeda and associated forces—including serving as a trusted travel facilitator and assisting with multiple terrorist plots—are sufficient to demonstrate that he was "part of" al Qaeda and associated forces. …

2. Al-Hela's complaints about the district court's conclusion that he "substantially supported" al Qaeda and associated forces are likewise unpersuasive.

a. As an initial matter, al-Hela suggests that he cannot be detained unless his support rendered him "functionally part of an enemy force." Al-Hela's "functionally part of" test is indistinguishable from the test this Court already employs to determine whether an individual is "part of" al Qaeda and associated forces, see *Hussain,* 718 F.3d at 968, and thus would render the government's express authority to detain those who "substantially supported" enemy forces wholly superfluous. But detention authority under the AUMF and the NDAA by necessity covers individuals who are not "functionally part of" an enemy force, but instead provide substantial support. *See Al-Bihani,* 590 F.3d at 874. At a minimum, that standard for detention must encompass individuals, like al-Hela, who provide support to al Qaeda and two of its associated forces that is collectively substantial. If that support does not render him functionally "part of" one or more of those forces, it would be anomalous to conclude that, by distributing his support activities among multiple organizations covered by the AUMF, al-Hela has insulated himself from detention.

The NDAA's inclusion of substantial support as an independent ground for detention accords with the nature of this armed conflict. Unlike a state-sponsored regular armed force, al Qaeda and associated forces operate in substantial part through loosely affiliated terrorist cells of individuals who often seek to hide their connection to the broader organization. As this Court has recognized, such individuals do not "wear uniforms" or carry "membership cards." *Ali,* 736 F.3d at 546. Treating individuals who knowingly provide recruitment, transportation, travel facilitation, communications services, financing and financial services, or other forms of substantial support to al Qaeda and associated forces as beyond the scope of the AUMF would subvert the statute and undermine the law of war by rewarding terrorist groups for assigning pivotal tasks to individuals who purposefully attempt to disguise their connection to the organization.

As the district court recognized, the law of war provides for detention in certain analogous circumstances. For instance, in certain circumstances, the Geneva Conventions afford prisoner of war status to (and thus contemplates the detention of) individuals like "supply

contractors" "who accompany the armed forces without actually being members thereof." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art.4, 6 U.S.T. 3316, 75 U.N.T.S. 135. Similarly, as a historical matter, one of the first codifications of the law of war recognized that a sovereign may detain persons who aid the enemy, including certain individuals who contribute to the enemy's war efforts or threaten the security of the detaining state. *See, e.g.*, Instructions for the Government of Armies of the United States in the Field, art. 15 (Apr. 24, 1863) (Lieber Code) ("Military necessity ... allows of the capturing of every armed enemy," as well as "every enemy of importance to the hostile government, or of peculiar danger to the captor").

b. Al-Hela is likewise wrong to suggest that the support he provided must be tied to a specific hostile act against the United States or a coalition partner. As a factual matter, the district court found that al-Hela provided support to a successful attack on the British Embassy in 2000, and was involved in two plots against U.S. targets as well. In any event, the text of the 2012 NDAA makes clear that detention authority extends to "[a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities." 2012 NOAA § 1021(b)(2). It is the organizations and forces that are "engaged in hostilities against the United States or its coalition partners," not the "person" who is a "part of or substantially supported" those forces. *Id.* This is confirmed by the NDAA's "including" clause, which lists individuals: who "commit a belligerent act" or "directly support such hostilities" as examples of those who may be detained, without indicating that those circumstances are the *only* justifications for detention. And it is wholly consistent with this Court's precedent, which has consistently reject[edl the notion that a detainee must have engaged in hostilities" to be subject to detention. *Hussain,* 718 F.3d at 968.

c. A1-Hela also offers various temporal arguments about his detention. He contends that he cannot be detained because he "was not substantially supporting al Qaeda, the Taliban, or an associated force at the time of his abduction in September 2002," or, more broadly, because there was no finding of specific instances of support for the September 11, 2001 attacks, or after September 11, 2001.

Despite his long-term and repeated track record of support, outlined in his own statements, al-Hela apparently believes that the United States was required to wait to detain him until it developed evidence that he had successfully facilitated an attack or the travel of an al Qaeda fighter post-September 11. These contentions lack merit.

* * * *

d. Al-Hela's general contentions about the nature of his relationship with al Qaeda and associated forces fare no better. His contention that his support was only "sporadic and informal" is inconsistent with the evidence. The evidence of al-Hela's involvement in bomb plots alone places him in five plots over roughly seven months. [redacted text] …

II. The District Court Properly Found That AAIA And EIJ Were Associated Forces Of Al Qaeda

Al-Hela contests the district court's findings that AAIA and EIJ were "associated forces" of al Qaeda such that his involvement with those organizations renders him detainable. His arguments fail.

A. 1. Al-Hela primarily contends that no evidence supports the proposition that AAIA "entered the fight alongside al Qaeda." Al-Hela does not contest that AAIA announced its support for al Qaeda and bin Laden after the fatwa in 1998 and began to call for attacks against Western targets in Yemen. Nor does he contest that in the wake of those statements, AAIA began to undertake attacks against Westerners, including the kidnapping of a group of Western tourists in 1998. And he does not contest that AAIA carried out a successful bombing attack on the British Embassy in 2000. The district court also found that AAIA, or members of the organization, had a role in two additional plots to attack the U.S. Embassy in Yemen (one with al-Hela's assistance). The district court properly concluded that these efforts demonstrated that AAIA "entered the fight alongside al Qaeda by participating in hostilities against the U.S. and its coalition partners in the same comprehensive armed conflict;" and that AAIA was an associated force "at the time al-Hela was captured in 2002."

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B. Al-Hela's arguments that the district court erred in concluding that EIJ was an associated force fail for essentially the same reasons. Al-Hela's only dispute with the facts of EIJ's connection to al Qaeda is his contention that the June 2001 merger between EIJ and al Qaeda involved very few EIJ members, but that contention rests on a web article and a book not submitted to or considered by the district court. Otherwise, al-Hela does not seriously contest that EIJ leader Ayman al-Zawahiri signed bin Laden's fatwa in l998; that EIJ was a primary ally of bin Laden in the ensuing years; and that al-Zawahiri is now the leader of al Qaeda, a position he assumed after bin Laden's death. The district court also found that "EIJ members had access to al Qaeda training facilities and terrorist operatives," and that EIJ planned to attack the U.S. Embassy in Albania after signing the fatwa in 1998. Al-Hela complains that this plan "was not shown to have an al Qaeda link," but ignores the evidence of EIJ's alliance with al Qaeda in 1998 and the fact that this attack showed EIJ "had changed its targeting to include Western targets outside Egypt after al-Zawahiri signed bin Laden's fatwa. As the district court explained, "EIJ, under the leadership Ayman al-Zawahiri, made clear that the U.S. was one [of] its primary enemies when Zawahiri signed bin Laden's fatwa in 1998 and planned to attack the U.S. Embassy in Albania that same year." And these conclusions are supported by EIJ's designation as an entity associated with al Qaeda by the United Nations, as well as its designation as a foreign terrorist organization by the Department of State and the blocking of its assets under Executive Order No. 13,224. 66 Fed. Reg. 49,079 (Sept. 23, 2001). Al-Hela cannot show clear error in the district court's determination that EIJ was an associated force of al Qaeda.

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Cross References

International crime issues relating to cyberspace, **Ch. 3.B.6**
Advice and consent to ratification of NATO accession of North Macedonia, **Ch. 4.A.1.**
Rule of Law (IHL), **Ch. 7.A.4.**
ILC Draft Articles on Crimes Against Humanity, **Ch. 7.C.1.**
ILC's work on protection of the environment in relation to armed conflicts, **Ch. 7.C.2.**
Iraq claims cases regarding detention under the law of armed conflict, **Ch. 8.E.**
Maritime cybersecurity, **Ch. 12.A.4.a**
Establishment of U.S. Space Force, **Ch. 12.B.1.**
Cyber activity sanctions, **Ch. 16.A.10**
Israeli settlements in the West Bank, **Ch. 17.A.**
Responsibility to Protect, **Ch. 17.C.4.**